

EXHIBIT 50

<p style="text-align: right;">Page 1</p> <p>UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK -----X In Re: LEHMAN BROTHERS HOLDINGS INC., et al., Debtors. Chapter 11 CASE NO.: 08-13555(JMP) (Jointly Administered) -----X 125 Broad Street New York, New York September 12, 2013 9:21 a.m. VIDEOTAPED DEPOSITION of RICHARD MILLETT, before Melissa Gilmore, a Notary Public of the State of New York. ELLEN GRAUER COURT REPORTING CO. LLC 126 East 56th Street, Fifth Floor New York, New York 10022 212-750-6434 REF: 104785</p>	<p style="text-align: right;">Page 3</p> <p>1 A P P E A R A N C E S: (Cont'd) 2 3 WEIL, GOTSHAL & MANGES LLP 4 Attorneys for Lehman Brothers Holdings Inc. and 5 the Witness 6 767 Fifth Avenue 7 New York, New York 10153 8 BY: ARIELLE GORDON, ESQ. 9 PHONE 212-310-8000 10 FAX 212-310-8007 11 E-MAIL arielle.gordon@weil.com 12 13 14 ALSO PRESENT: 15 DANIEL SALEMI, Videographer 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 2</p> <p>1 A P P E A R A N C E S: 2 3 SULLIVAN & CROMWELL LLP 4 Attorneys for Canary Wharf Management, Heron 5 Quays (HQ2) T1 Limited and Heron Quays (HQ2) T2 6 Limited 7 125 Broad Street 8 New York, New York 10004-2498 9 BY: MARC DE LEEUW, ESQ. 10 JOHN GARRETT MCCARTHY, ESQ. 11 PHONE 212-558-4219 12 FAX 212-558-3588 13 E-MAIL deleeuw@succrom.com 14 15 16 WEIL, GOTSHAL & MANGES LLP 17 Attorneys for Lehman Brothers Holdings Inc. and 18 the Witness 19 1300 Eye Street NW, Suite 900 20 Washington, DC 20005-3314 21 BY: PETER D. ISAKOFF, ESQ. 22 PHONE 202-682-7155 23 FAX 202-857-0940 24 E-MAIL peter.isakoff@weil.com 25</p>	<p style="text-align: right;">Page 4</p> <p>1 ----- I N D E X ----- 2 WITNESS EXAMINATION BY PAGE 3 RICHARD MILLETT MR. DE LEEUW 8, 341 4 MR. ISAKOFF 338 5 6 7 ----- E X H I B I T S ----- 8 MILLETT DESCRIPTION FOR I.D. 9 Exhibit 117 Portions of Textbook 46 10 Entitled The 11 Interpretation of 12 Contracts by Sir Kim 13 Lewison 14 Exhibit 118 Printout of Decision, CDV 55 15 Software Entertainment 16 A.G. versus Gamecock 17 Media Europe, Limited 18 Exhibit 119 Excerpts from the 79 19 O'Donovan and Phillips 20 Treatise, The Modern 21 Contract of Guarantee 22 Exhibit 120 Retyped Version of 150 23 Paragraph 1 from Schedule 24 4 25</p>

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A. Yes, two-one.

Q. There's a first class and a second class, and you were in the upper of the second class?

A. Yeah. There's a first class, an upper second, lower second, and third.

Q. I noticed in your report you referred to a Megarry Prize for landlord and tenant law?

A. Megarry.

Q. Megarry. Thank you very much. Is that a prize award by Cambridge University?

A. No, it's not. It's a prize that is awarded by the four ends of court for the top mark in the landlord and tenant specialist exam, which forms part of the bar exam for England and Wales.

Q. Through the -- that's a separate school from Cambridge University?

A. Yes. It's the post graduate professional training school.

Q. How many times have you been retained as an expert?

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were being instructed as a barrister; is that correct?

A. Well, I'm still being instructed as a barrister, but was instructed as an advocate to fight at the case and advise on the case on behalf of the client, but not as an expert.

Q. Thank you.

Do you know Laurence Rabinowitz?

A. Yes.

Q. Do you believe he is a well-respected commercial lawyer?

A. Yes.

Q. In fact, he is very highly regarded in England as a commercial lawyer; is that correct?

A. Yes.

Q. What were you given in connection with drafting your first declaration in this case?

MR. ISAKOFF: I'm going to object to that. That's outside the scope of discovery.

MR. DE LEEUW: You're not allowing him to answer?

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A. I can't remember. I can't remember a precise number. I can't give you a precise figure.

Q. Could you give me a ballpark figure?

A. It's probably about ten.

Q. I think you said it was probably somewhere from five to ten with Weil.

Were those all expert retentions?

MR. ISAKOFF: I'm going to object to the form of that question.

A. I did not say that I had been retained by Weil Gotshal as an expert five to ten times.

What I said was what that I had been instructed, as a barrister, on cases by Weil Gotshal between five and ten times, very much as a ballpark.

Q. That was my question. How many times have you been retained by Weil Gotshal as an expert?

A. To the best of my recollection, this is the first such instruction.

Q. In the previous instances in which you have been working with Weil Gotshal, you

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MR. ISAKOFF: No, not that question. You might be able to ask him whether he relied on something that he was given, but you can't just ask for communications.

Q. Do you recall what it was that you looked at in connection with rendering your opinions in your first declaration?

A. A lot of English cases and a Northern Irish case.

Q. Do you recall anything else that you looked at in connection with rendering your opinions in your first declaration in this case?

A. Textbooks and some Australasian cases.

Q. Australasian being Australia and Asia?

A. Australia and New Zealand, actually.

Q. Is there also any Canadian cases?

A. There may be some Canadian cases.

Q. Do you know whether you looked at Lehman's objection, which has been marked as Exhibit 60, in connection with reaching the opinions in your first declaration in this

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So, simply fastening on the word "primary," and saying ah-ha, it's an indemnity, is the wrong approach. You've got to look and actually work out what's going on when the word "primary" is used, set in its context, and work out whether what the parties are intending is actually that the person providing the putative surety, as it were, putative guarantor or indemnifier, is actually undertaking an independent liability, wholly independent of that which arises as between principal and creditor, here, Canary Wharf and LBL.

Q. Well, but it doesn't have to be independent, as Sir William Blackburne points out in Vossloh. If there is a joint and several liability clause, then the liability of the surety can be -- cannot be, does not need to be independent in order for there to be an indemnity; isn't that true?

MR. ISAKOFF: Object to form.

A. No, it's the wrong way of putting it. You didn't characterize what Sir Bill has said. He doesn't refer to joint and several. He refers to joint, if you look at the words

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not independent, even though he may be expressed to be primarily liable. That's the point that Sir Bill is making.

Q. In that case, the primary obligor would not be an indemnitor?

A. Correct. That's what he said.

Q. Isn't he referring to indemnities in paragraph 25?

A. Yes, but he is saying, unless, as is quite possible, he, that's the surety, has undertaken his liability jointly with the principal, his liability is wholly independent of any liability which may arise as between the principal and the creditor.

What he's describing there is the indemnifier, the surety is an indemnifier if his liability is wholly independent of any liability, but if he's jointly liable, then it's not.

Q. Your testimony is that paragraph 25 is providing for an exception that if the contract provides for joint liability as between the surety and the principal, then that provision means that the indemnitor -- excuse

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just before letter J on page 312.

Q. Let me maybe rephrase it to make it mirror exactly what Sir William Blackburne is saying.

Is it fair to say that an indemnity can have a situation where, because there's a joint liability provision -- let me start again, because you were just about to answer.

Is it true that an indemnity, because it has a joint liability provision, can have a situation where the indemnitor has liability that is not wholly independent of liability of the principal?

A. You've got yourself a bit muddled up there.

The position is as follows. If a party, that's not characterizing as one thing or the other, joins up jointly with the primary obligor, the principal, which is the word we use, correctly spelled this time, then his liability will not be wholly independent of the principal's liabilities.

In that situation, that person is not an indemnifier, because his liability is

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me -- the surety is not taking on an indemnitor role because there is not independent liability?

MR. ISAKOFF: Could I hear that back? I lost you.

A. I'm sorry.

Q. You didn't understand?

A. I was trying to follow it. I'm trying to read what he was saying.

Q. I realize you are trying to read at the same time.

Have you read through the sentence?

A. Yeah, to me --

Q. Okay. Paragraph 25 is describing indemnities as opposed to guarantees, correct?

MR. ISAKOFF: Object to form.

A. Paragraph 25 does what it says. It sets out what the essential distinguishing features of what is a properly so-called indemnity, and there's a wide sense and a narrow sense.

Q. Put aside the wide sense and the narrow sense for a moment. We will get to that.

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of the word "indemnify" and "indemnified," would you agree with me that that's relevant, but not dispositive, in considering whether a contract is one of indemnity versus guarantee?

MR. ISAKOFF: Object to form.

A. Yes. I mean, I can't sit here and say that it's utterly irrelevant to the question before an English court was, what is Schedule 4 as a matter of its true characteristics, properly interpreted, nobody -- of course, you would look at all the words, and included in the words are the words "shall indemnify and keep indemnified." I'm not going to pretend it's irrelevant.

Q. Use of those words would tend to support an argument that the contract is one of indemnity, but, in your view, you would need to look at all the rest of the words in context, correct?

A. No, I don't think it tends to support the argument one way or the other. There is part -- hang on.

Q. I apologize. I saw you were continuing, so I stopped.

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A. That's true, too.

Q. And if, I take it, the parties were to use the word "guarantee," I think you would say that that would tend to move the needle slightly towards a characterization of the contract as one of guarantee rather than indemnity, correct?

MR. ISAKOFF: Object to form.

A. No. You see, you say moving the needle. You would argue that as a barrister in front of the commercial court, but as a judge, who has actually got the job of interpreting the document, you would look at the labels, you look at the words, which have a legal content in terms of art, if you like, and try to put aside any preconceptions that the use of those terms of art allows to intrude.

See, so I'm going to forget about the use of the word "indemnity." I'm going to neutralize it, and I'm going to forget about the use of the word "guarantee." I'm going to neutralize that.

I'm not going to go with what the parties have chosen as their term of art

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A. They are part of the iterative process of construction that an English court would undertake. They are relevant because they are part of the exercise, but they are no more than that.

Q. Okay. That was really my question.

In that part of the exercise, use of the words "indemnify" or "indemnified" would move the needle. We don't need to discuss how far it would move the needle, but it would move the needle slightly or maybe largely in favor of an indemnity?

MR. ISAKOFF: Object to form.

A. I don't understand the image at all.

Q. Would it be -- to use the image, wouldn't it be fair to say that, as you go through the contract, you look at all the various words that the parties have utilized to try to capture their intent; is that fair?

A. That's true.

Q. Okay. And as you do that, certain words may tend to support one characterization of the obligation as opposed to the other, correct?

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labels. I'm going to look at the whole document and interpret all the words, putting them all together, and actually come to a conclusion about what the parties were doing.

Q. If you could go back to the Vossloh decision, Exhibit 103, paragraph 25?

A. Yes. Yes.

Q. You made reference to this earlier. In paragraph 25, Sir William Blackburne refers to both a broad sense of the words "contract of indemnity" and a narrower sense.

Do you recall that?

A. Yes, I do.

Q. And what he is referring there, if I can perhaps paraphrase, is that in the broader sense, contract of indemnity means any obligation imposed by law or by contract, and in a narrower sense, a contract of indemnity is a contract where you -- the indemnitor gives some security for the performance of the obligation, correct?

MR. ISAKOFF: Object to form.

A. No, I'm not, with respect, sure that you really characterized it properly.

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2 AFTERNOON SESSION
3 (Time noted: 1:05 p.m.)
4 THE VIDEOGRAPHER: This is tape
5 three of the deposition of Mr. Richard
6 Millett. We are now on the record at
7 1:05 p.m., September 12, 2013.
8 RICHARD MILLETT, resumed and
9 testified as follows:
10 CONTINUED EXAMINATION
11 BY MR. DE LEEUW:
12 Q. Mr. Millett, with respect to the
13 second part of paragraph one of Schedule 4,
14 which you have circled on Exhibit 120, is it
15 not the case that there are contracts of
16 indemnity that sometimes provide for
17 obligations that will allow an indemnitor to be
18 liable when the principal is no longer bound by
19 a contract?
20 MR. ISAKOFF: Object to form.
21 A. I'm really sorry. I don't mean to
22 keep being boring, but could you repeat the
23 question?
24 Q. No, no, that's okay. If you don't
25 understand, I want to make sure you understand

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2 the question. Let me ask it maybe more simply,
3 if I could.
4 Is it sometimes the case that
5 contracts of indemnity will provide that the
6 indemnitor will be liable for circumstances
7 where the underlying principal will no longer
8 be bound to the contract or liable on the
9 contract?
10 MR. ISAKOFF: Object to form.
11 A. Contracts of indemnity, properly
12 say, characterized by the exercise that we have
13 been talking about, can do that.
14 Q. And, in fact, one way in which
15 contracts of indemnity can provide for
16 liability of the surety in the case where an
17 underlying principal is no longer bound or
18 liable, by setting forth language like the
19 language in the second part of exhibit -- of
20 paragraph one of Schedule 4, which is circled
21 on Exhibit 120?
22 MR. ISAKOFF: Object to form.
23 A. No -- I mean, if I said yes or no,
24 it's not going to help you very much. I mean,
25 I don't really know how to answer the question.

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2 No, I don't think that's right. You
3 need -- if what you mean by that is the
4 language on its own, taken on its own with
5 nothing else around it, then maybe. It
6 depends. I haven't looked at that. We haven't
7 debated that question.
8 Q. I'm not asking for a debate. I'm
9 just asking you, would you agree with me that
10 it is not unusual for a contract of indemnity
11 to provide language like in the second part of
12 paragraph one to allow for liability of the
13 surety in cases where the principal was no
14 longer bound or liable?
15 MR. ISAKOFF: Object to form. It
16 completely mischaracterizes -- I object to
17 form.
18 A. If you had a contract of indemnity,
19 and you could decide that the contract, as a
20 whole, was one of the indemnity, then I would
21 accept this much, that the words which follow
22 the "and" down to the proviso, wouldn't be
23 inconsistent with it.
24 Q. And those words, the words from
25 "and" down to the proviso, the second part of

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2 paragraph one of Schedule 4, would not be
3 unusual for a contract of indemnity, would
4 they?
5 MR. ISAKOFF: Object to form.
6 A. I'm -- not be unusual? You often
7 see words -- would these words be unusual? I
8 don't know. I can't really answer that
9 question.
10 (Exhibit 121, Portions of Treatise
11 Entitled Law of Guarantees, marked for
12 identification.)
13 Q. Let me hand you what's been marked
14 as Exhibit 121.
15 A. Right.
16 Q. What I have done here is to copy
17 quite a bit of the treatise that is written by
18 you and Ms. Andrews.
19 Is this the treatise that you
20 co-authored with Ms. Andrews, Law of
21 Guarantees?
22 A. Yes. This is the sixth edition of
23 it.
24 Q. And just so you know, I have a copy
25 of the full treatise if you need it. I tried

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Q. Where does it say that?

A. First part of paragraph one.

Q. I see. So, what you're saying is that paragraph one implies an obligation for paragraph two?

MR. ISAKOFF: Object to form.

A. As I have said, in my opinion, this is -- let me start up a little bit again.

I read those words in the last part of clause two, paragraph two, as words of limitation, so that where the landlord is enforcing its rights hereunder, in other words, under Schedule 4, it's entitled to, it doesn't have to, but it's entitled to, may proceed against the surety, as if the tenant -- the surety was named as the tenant in the lease. But no further than that.

I read out of that, that it may not proceed against the surety to any wider extent than it would against the tenant.

Q. Does the fact that the provision also says that it's a joint and several liability between the surety and the tenant affect your opinion in any way?

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A. 2007, yes.

Q. As of 2007, LBL was bound to the lease and the surety states, in paragraph one, that it will duly perform and observe all the covenants on the part of the tenant contained in this lease, including the payment of rent.

Do you see that?

A. Yes.

Q. So, coming back to my hypothetical, on January 1, 2007, a rent payment would be due. And instead of sending payment to LBL, could Canary Wharf, as the landlord, send a bill to LBHI?

A. If it was due, yes, it could. And that's precisely right. That's exactly the effect of it. It is to preclude the need for demand before enforcing the obligations.

Q. Could it send that notice on December 31 to LBHI, and ask that LBHI pay the amount that's coming up due the next day?

A. Not if it hasn't fallen due yet, no, because there's no obligation to be performed by either of them.

Q. But could it ask that LBHI make the

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A. No.

Q. So, in your view, paragraph two is limited by paragraph one insofar as the obligation must become due from the tenant before the landlord can proceed against the surety?

A. Well, there must be something to -- no, please be careful with the terminology. There must be something which is capable of being enforced as against the tenant.

So, if there's nothing to be enforced against the tenant, no liability, no obligation, one or the other, then there's nothing to enforce against the surety.

Q. Let's go back to paragraph one. Let's assume for the moment that LBL is still bound by the lease, okay?

A. During the -- so we're talking about the currency of the lease, during the lease?

Q. During the lease. Let's use January 1, 2007.

A. All right.

Q. On January 1, 2007, you would agree with me that LBL was bound to the lease.

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payment on January 1?

A. Well, you can ask, but it would get a pretty dusty answer, and once the date had passed, and there was a liability on the part of the tenant to pay the rent, then Canary Wharf could legitimately turn to LBHI and say your tenant hasn't paid yesterday or midnight, actually, please pay.

Q. But before we get to LBL failing to pay, there's nothing wrong, in fact, it's explicitly permitted under paragraphs one and paragraphs two of Schedule 4, for Canary Wharf to send a bill and ask LBHI to make the payment rather than LBL, correct?

A. No. Let's be careful.

Once the tenant's obligation has fallen due under the covenants in the lease, including the obligation to pay rent, then once that liability has accrued, then I accept that Canary Wharf has got the choice, it can either go to LBL and say pay up, or it can go to LBHI and say your tenant hasn't paid up, please pay.

Q. When the payment is due, Canary Wharf can ask either party to pay. It doesn't

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2 need for LBL to become delinquent in its
3 payments.
4 A. But it would, by definition, have
5 become delinquent in its payment by failing to
6 pay.
7 Q. No. I said my example is they are
8 sending the notice on December 31, and they are
9 asking for the payment to be made on January 1.
10 There's nothing wrong with that. And, in fact,
11 that's permitted under paragraphs one and two
12 of Schedule 4, correct?
13 A. No. I think I don't agree with
14 that. I don't quite see how you get that out
15 of it.
16 Q. If I could ask you to turn to
17 paragraph six of Schedule 4 that's been marked
18 as Exhibit 3.
19 A. Sorry.
20 Q. Paragraph six.
21 A. Yes.
22 Q. This is the paragraph that contains
23 a whole list of various events that will not
24 discharge or affect the liability of the
25 surety, correct?

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2 A. In any way release, discharge, or in
3 any way lessen or affect the liability of the
4 surety is what clause six says.
5 Q. I think you referred to paragraph
6 6(d) as a provision that was designed to
7 address the rule of Holme versus Brunskill; is
8 that right?
9 MR. ISAKOFF: Object to form. Why
10 don't you show him what you are referring
11 to?
12 MR. DE LEEUW: I'm trying to make
13 this a little bit more efficient.
14 MR. ISAKOFF: Then I object to how
15 you're doing it.
16 MR. DE LEEUW: That's fine.
17 A. What do you want me to look at?
18 Sorry.
19 Q. 6(d). Would you agree with me that
20 paragraph 6(d) is designed to address the rule
21 in Holme versus Brunskill?
22 MR. ISAKOFF: Object to form.
23 A. (Perusing.) Subject to your use of
24 the word "address," I think that -- it does
25 what it says, and the rule of Holme and

1 MILLETT
2 Brunskill, I've explained in my opinion.
3 So, on its face, any variation of
4 the terms of the lease is what is being caught.
5 Q. You would agree --
6 A. Covered.
7 Q. -- would you not, that paragraph
8 6(d) was intended to avoid a material variation
9 rule that would allow a party to get -- a
10 surety to get out of its obligations if the
11 contract were considered to be a guarantee --
12 MR. ISAKOFF: Objection.
13 Q. -- in Home versus Brunskill; is that
14 fair?
15 A. Yes.
16 Q. So, maybe the word "address" was
17 what was causing you the problem in my prior
18 question.
19 Would you agree with me that
20 paragraph 6(d) was drafted with the rule of
21 Holme versus Brunskill in mind?
22 MR. ISAKOFF: Object to form.
23 A. I have no idea what was in the
24 draftsman's mind.
25 What I do know is that that is a

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2 fairly standard clause you see in guarantees,
3 not in indemnities, but in guarantees, in order
4 to preclude the guarantor from being discharged
5 by a variation of the terms of the lease,
6 because a variation of the terms of the lease,
7 without his consent, under the rule of Holme
8 and Brunskill, will release him.
9 Q. Thank you. And you would agree with
10 me that the insertion of a clause like 6(d)
11 could be used to support an argument either
12 that the contract is one of a guarantee or one
13 of an indemnity, correct?
14 A. No, not really. I don't see the
15 parity.
16 I think -- my own view is that one
17 has to be careful in overgeneralizing, but the
18 presence of these, what people have called
19 exclusion clauses, which remove the equitable
20 rights of a guarantor to be released in certain
21 circumstances, in my view, tends strongly to
22 indicate that the document, as a whole, is a
23 guarantee, they're simply unnecessary in the
24 case of an indemnity, but you've got -- I
25 emphasize that, in order to form a final

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opinion, you have to look at the document as a whole.

And, of course, if there are other indicia in the document which point strongly in favor of it being an indemnity, all other roads point to Rome sort of thing, then the presence of that provision may lead the court to give it no weight.

Q. You recall that, in the Vossloh decision, there was a discussion by Sir William Blackburne that exclusion clauses, like the one you're referring to, could be read either to support an argument that the contract is one of guarantee, or to be doubly sure that it was one of indemnity, right?

A. Yes. It's paragraph 27. I think we have set it out, or I have set it out in my opinion.

Q. And could I ask you to look back at the treatise that you co-wrote, which has been marked as Exhibit 121, page 13?

A. Page 13?

Q. Correct.

A. Right.

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for the contract being one of guarantee, do you?

A. Not in so many terms, but if you look at the previous paragraph, which starts at the foot of page 12, and I will read it slowly so that you really have it.

"The question whether a particular contract happens to be a guarantee or an indemnity, and whether the normal incidents of a contract of that class have been modified, is a matter of construction in each case, and is often very difficult to resolve. A contract of suretyship which contains a provision preserving liability in circumstances in which a guarantor would otherwise be discharged (such as the granting of time to the principal or a material variation of the underlying contract without the surety's consent) will usually be construed as a guarantee, because such a provision would be unnecessary if the contract was an indemnity."

That's really what I was referring to before. The normal approach is that if these provisions are there, then it normally

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Q. In the first full paragraph on page 13, you are referring to so-called exclusion clauses, correct?

A. Yes.

Q. And in the second sentence, you say, "Although it may be argued, by parity of reasoning, that this tends to indicate that the contract is a guarantee, such a provision may point towards the opposite conclusion because it may show that it was intended that the liability of the obligor should continue regardless of what might happen to the principal debtor."

Do you see that?

A. Yes.

Q. And that's, again, another reference to the fact that an exclusion clause might point either to the contract being one of guarantee, or to it being a contract of indemnity, correct?

A. Yes.

Q. And you didn't say, in page 13 of your treatise, that the presence of an exclusion clause is a strong point of support

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points to it being a guarantee, but that isn't to say that that's always the case, as the next paragraph goes on to explain.

Q. Right. And the next paragraph goes on to explain that the presence of these type of clauses may very well point towards the opposite conclusion?

A. When you say may very well, where did I say that?

Q. You say, "Such a provision may point towards the opposite conclusion, because it may show that it was intended that the liability of the obligor should continue regardless of what might happen to the principal debtor."

A. That's what the text says, yes. The words very well don't appear in there. They appeared in your question, but not in my text.

Q. You would agree with me that the presence of paragraph 6(d) and 6(g) may show that it was intended that the liability of the obligor should continue regardless of what might happen to the principal debtor.

A. Well, you can't discount that, no.

Q. Could I ask you to turn to paragraph

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eight of Schedule 4, which has been marked as Exhibit 3? Back to Schedule 4 on the right side.

A. So which paragraph?

Q. Paragraph eight.

A. Paragraph eight, benefit of guarantee and indemnity.

Q. Right. You agree that there are times when a particular clause may be both a guarantee and an indemnity obligation, correct?

MR. ISAKOFF: Object to form.

A. Well, something can't be both black and white. So, no, I don't agree with the way you have put the -- the formulation of the question.

Q. Do you agree that a particular contract provision may have both a guarantee obligation and an indemnity obligation?

A. Yes, in the most general of terms, you can, but -- but wait, you have to characterize by biting the bullet, grab the mettle, the particular obligation you've got.

You can have a contract where there are some guarantee obligations, and some

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point in either the direction of guarantee or indemnity?

A. Well, if there's no other indication, no, it wouldn't, but, again, I think there's probably common ground about this, you have to look at every single word that's used, and there is -- it is not irrelevant, to use the expression I think we agreed before, that the parties chose to characterize this instrument as a guarantee and indemnity. I'm not sure it takes you very far, personally.

Q. And the reason you say it doesn't take you very far is because by saying guarantee and indemnity, it still doesn't tell you which obligations might be guarantee obligations and which obligations might be indemnity obligations; is that fair?

MR. ISAKOFF: Object to form.

A. Well, in my opinion, and I think I have covered this point actually, at page 16, my first opinion, and I said it was notable that the parties considered that at least some part of Schedule 4 constituted a guarantee. So

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separate indemnity obligations, perhaps relating to a different subject matter. But where the subject matter of the surety's, using that word neutrally, surety's obligations are covering a single underlying group of obligations by the principal debtor, then you've got to decide whether it's a guarantee or whether it's an indemnity. It can't be both.

Finishing off this answer, you very often see either the expression, guarantee and indemnity, used as a heading or shorthand for the instrument itself. It is -- I don't think I've come across a case where a court has construed it as both running in parallel, but it is a shorthand often used.

Q. So, in that case where there's a shorthand often used, where the words "guarantee" and "indemnity" are used, it still befalls the court to figure out whether it's a guarantee or an indemnity, right?

A. Yes, that's fair.

Q. So, the fact that the words "guarantee" and "indemnity" are used doesn't

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you've got to make sense of the composite expression.

My opinion is that you make sense of the composite expression by looking at clause one as a composite, as having a composite function.

Q. Both the guarantee and an indemnity are in clause one?

MR. ISAKOFF: Object to form.

A. Well, as we have covered before, the words "indemnity" and "shall keep indemnified" are contained in clause one, but that doesn't convert it into an indemnity. It isn't, as we've -- we've been over this.

Q. But what you're saying there is that you believe the words in paragraph eight of Schedule 4 indicate that paragraph one has a composite guarantee and indemnity obligation?

MR. ISAKOFF: Object to form.

A. I think the right way of reading clause eight is simply a reference back, possibly quite a clever and convenient reference back to clause one, which is a guarantee, which contains, as the second

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element of it after the words "and," as we've discussed, are the words "indemnity."

In my own view, it's really the only sensible way you can read it. Otherwise, you've got to give those -- you've got to put a line through one or other. The draftsman put both words in, and was presumably doing so for a purpose.

Q. You agree that indemnification clauses may overlap with a guarantee obligation completely, would you not?

A. Well, they can do, but if they're covering different subject matters, yes.

Q. And in those cases, the guarantee aspect of the clause would be redundant, because the creditor is almost invariably going to be better off enforcing the primary obligations undertaken in an indemnity, correct?

MR. ISAKOFF: Object to form.

A. Well, I'm guessing what you're asking me, but that was, in effect, what happened in the Sofaer case, where the word "guarantee" was used, but the judge said, well,

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Q. And your view is that the draftspeople got something wrong in entitling paragraph one an indemnity, and in stating that paragraph one is a primary obligation, and in saying that the surety shall indemnify and keep indemnified the landlord?

MR. ISAKOFF: Object to form.

Q. Is that fair?

A. No, I don't think that's quite fair.

I don't reach my opinion by looking at the labels. It's Mr. Rabinowitz, when he put up his first opinion, who used the labels as part of the exercise.

Now, clause 2.7 of the lease says -- I don't want to get this wrong, so let's -- what it says is, the titles and headings, this is page ten of the lease, "The titles and headings appearing in this lease are for reference only and shall not affect its construction."

So I tried to be faithful to that and didn't look at indemnity. That works both ways. It could be very convenient, because it allows me to ignore the word "indemnity" in

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actually, that's just verbiage.

In fact, when I look at the whole of this contract, I think it's an indemnity, but you've got to be careful here, as Mr. Rabinowitz agrees, and I will agree with him, the courts don't readily conclude the parties have used words by accident or mistake, and, therefore, one of the first rules of construction of a commercial contract in English law is that you look at each word, and you give it its natural meaning.

If you do that in the context of clause eight, in my opinion, it's very clear. It refers back to clause one, properly understood as a single composite covenant in the way we discussed prior to the break. If you say it's an indemnity, because the word "indemnity" appears there, that would require you to put a line through the word "guarantee" -- "guarantor" or "guarantee," and that means there's a problem. That means the draftsman got something wrong, and it's not impossible, it's just unlikely. It's inconsistent with what's gone before.

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clause one, but it also means that it have to ignore the word "guarantee" in clause eight, and guarantor in clause ten.

So, the argument, if you're looking at headings, is entirely neutral. I don't rely on them, so I don't agree with what you have put to me.

Q. I didn't just ask you about headings, sir. I asked you about the word "primary obligation" in paragraph one, and the word "indemnify" and "keep indemnified" in paragraph one.

Is that, in your view, a drafting error by the draftspeople?

A. No, absolutely not. What it does, as I've explained before, is that it is an expression which does not connote the indemnity relationship. It is a whole -- it is a word that means hold harmless, which, in English law, terms of art or English legal language, means paying up in full.

Q. And the word "primary obligation" is not a primary obligation, in your view?

A. We have been around that boy a

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number of times.

Q. Is it a primary obligation in paragraph one?

A. As I say, I think I have covered this a number of times. I don't believe, looking at the guarantee as a whole, whether looking myopically at the word in clause one or the whole of the document, that LBHI is a primary obligor or primary obligor in the way in which you mean it, i.e., as an indemnifier.

I have explained, in my opinion, what the purpose of those words "primary obligation" is.

Q. Could I ask you to take a look again at paragraph 6(d) of Schedule 4 marked as Exhibit 3?

A. Okay. I have that.

Q. You reach the opinion that the forfeiture letter discharges LBHI's obligation, notwithstanding paragraph 6(d), because the forfeiture letter does not vary the terms of the lease; is that correct?

A. That's a reasonable summary of my opinion, but I prefer to stick with the words

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So to that extent, the rule is triggered, but in my opinion, the law in England is wider than simply -- sorry -- the rule in Holme and Brunskill and the principle underlying that case goes to a variation of prejudicial -- no, not -- obviously not prejudicial variation of the commercial risks inherent in the relationship.

Q. Just to make sure I've got -- I'm going to follow up on that, just to make sure I've your opinion correctly.

Your opinion is that the forfeiture letter triggers the rule of Holme versus Brunskill, but paragraph 6(d), which you earlier told me was drafted, generally, with that rule in mind, is not triggered; is that fair?

MR. ISAKOFF: Object to form.

A. Well, whatever I -- the transcript will obviously reveal what I said before.

The short answer to the question, I think, as we can probably cut through this, is the rule in Holme and Brunskill is a little bit wider than simply a variation of the printed

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in my opinion, if you don't mind.

Q. Would you also agree that the rule of Holme versus Brunskill is that the surety's obligation shall be discharged upon a material variation of the principal contract?

MR. ISAKOFF: Object to form.

A. Without his consent, yes.

Q. Thank you. Even though you say that paragraph 6(d) is not triggered by the forfeiture letter, you say paragraph 6(d) -- excuse me. Strike that. I will ask it again.

Even though you say paragraph 6(d) is not triggered by the forfeiture letter, you opined that LBHI's obligations are discharged because the forfeiture letter otherwise varies the relationship between LBHI and Canary Wharf; is that fair?

A. Not quite. The forfeiture letter causes -- the forfeiture letter either causes obvious prejudice to LBHI, or, at the very least, causes it -- or, at the very least, can't be shown not to cause it prejudice, and you will appreciate that the rule in Holme and Brunskill has this negative burden of proof.

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words on the page of the principal contract.

If the creditor and principal debtor run their relationship in such a way as to alter the balance of the commercial risk and to expose the guarantor to a much -- to a greater commercial risk that he will have to pay up, then he is discharged.

Q. But that same analysis, the scope of the rule will not apply to paragraph 6(d) in your rule; is that correct?

A. Well, because -- that is correct, because 6(d), on its terms, says variation of the terms of the lease. It doesn't say variation of the mode of performance of the lease.

Q. Could I ask you to turn to paragraph 50 of your first declaration, which has been marked as Exhibit 106?

A. Yes, I have it.

Q. You are responding to Mr. Rabinowitz. In the second sentence, you say, "His simple point is that the forfeiture letter did not vary any term of the lease but operated as a waiver of a right conferred on

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2 guarantor. That's the prejudice.
3 Q. Its exposure to additional liability
4 would be -- would be in place as a result of a
5 release of some portion of the administration
6 expense. Is that what you are saying?
7 A. I said what I said. It increases
8 the risk on LBHI of having to pay under the
9 guarantee. In circumstances where, so far as
10 back rent was concerned, I'm assuming that the
11 figures are of the order we've been talking
12 about, there was no such risk.
13 Q. When you're saying risk, is the risk
14 of paying some portion of the amounts owed
15 under the lease?
16 MR. ISAKOFF: Object to form.
17 A. In circumstances where that risk had
18 been removed by the -- by the bankruptcy,
19 because it carried with it -- sorry -- by the
20 administration, because it carried with it the
21 priority for rent.
22 Q. Now, what you're saying, just so I
23 make sure, I will finish this up, and then we
24 can take a break, what you're saying is it's
25 not just any rent. It's rent that would be

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2 pounds, gave up the claim to back rent,
3 whatever it was, and I don't know what it was,
4 as an administrative expense. That's the
5 point.
6 So, instead of getting, say,
7 30 million, and I use the figure purely by way
8 of illustration, off the top, in priority to
9 all the other creditors representing that back
10 rent, if that's what the back rent was, it only
11 got a million and a half, pushing the balance
12 of the 28 and a half down as an unsecured debt,
13 swelling the deficiency for the unsecured
14 creditors, and concomitantly increasing LBHI's
15 exposure under its guarantee.
16 Q. The 30 million hypothetical number
17 that you are using there, the number that you
18 are referring to is an amount that would be
19 payable as an administrative expense; is that
20 correct?
21 A. Yes. That's the example I'm trying
22 to give, yes.
23 Q. And the only amounts that are
24 payable as an administrative expense are for
25 amounts when LBL is in occupation of the

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2 claimable as an administrative expense; is that
3 fair?
4 A. Well, is what fair?
5 Q. Well, you said that Canary Wharf
6 gave up a claim for back rent.
7 They didn't give up a claim for back
8 rent, did they?
9 MR. ISAKOFF: Object to form.
10 You've mischaracterized his testimony.
11 A. That's not what I said, no, no, no.
12 Q. I'm just trying to -- maybe I'm
13 trying to -- you said something that was just
14 wrong. So I'm just trying to make sure if I
15 can narrow it, I think I will understand what
16 you are saying.
17 It's not any rent that was due as of
18 December 3, 2010. It was only rent in which
19 the administrators were in occupation of the
20 building, correct?
21 MR. ISAKOFF: Object to form.
22 A. Let's just be clear. The effect of
23 the forfeiture letter, we can read it, 3rd of
24 December letter, is that the -- is that Canary
25 Wharf, in exchange for a million and a half

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2 building as in -- in administration, correct?
3 MR. ISAKOFF: Object to form.
4 A. Well, I'm not sure you've got it
5 exactly right. It's the Nortel liability which
6 we refer to. Mr. Rabinowitz and I, I think,
7 have no quarrel with each other about what that
8 is. It's the Nortel liability.
9 Q. But just the fact that the lease is
10 in place doesn't necessarily give rise to a
11 claim for administrative expense for all back
12 rent. It's only for those rents that are
13 required to be paid as an administrative
14 expense under the Nortel decision, correct?
15 A. That is correct.
16 Q. And you don't know exactly what
17 administrative expenses were due under the
18 Nortel judgment when you say that there was a
19 variation by virtue of the forfeiture letter to
20 settle that claim for one and a half million
21 pounds, correct?
22 A. Well, that is correct, but the
23 burden -- as a matter of English law, the
24 burden of proving the variation is not
25 material, not prejudicial, lies on the -- lies

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2 on Canary Wharf in this case.
3 So, in the absence of any figures,
4 the English court would proceed to presume
5 prejudice.
6 Q. You say, in paragraph 49 sub (iii)
7 of your first declaration that's been marked as
8 Exhibit 106, "On any view, 1.5 million pounds
9 is significantly less than the full amount of
10 rent outstanding for the period during which
11 the administrators were in occupation."
12 Do you see that?
13 A. Yes.
14 Q. You didn't, in fact, know what was
15 the full amount of rent outstanding for the
16 period during which the administrators were in
17 occupation, did you?
18 A. No. That's a fair observation, but
19 on any view, unless you're going to tell me
20 that I'm wrong, just looking at the period for
21 which I did know that the administrators were
22 in occupation, and looking at the passing rent
23 under the lease, although I have no primary
24 instructions as to what the precise numbers
25 are, because my clients don't know, and if they

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2 do know, they haven't told me, on any view,
3 that is right. I can't give you the figure.
4 MR. ISAKOFF: Are you ready for a
5 break? We've been going for about an hour
6 and ten minutes.
7 MR. DE LEEUW: I have a couple of
8 follow-ups. Wait until I finish this line
9 of questioning.
10 MR. ISAKOFF: The line of
11 questioning will end in one minute, and
12 then we will take a break.
13 Q. Do you know when the LBL
14 administrators were in occupation of the
15 building giving rise to a claim for
16 administrative expense?
17 MR. ISAKOFF: Object to form.
18 A. Well, they were in occupation -- do
19 I know precisely? I can't remember, is the
20 truth. I did know. And I did know when I
21 wrote the opinion. I haven't refreshed my
22 memory as to those facts.
23 But I do know they were in
24 occupation, and you'll correct me if I'm wrong
25 about this, until the 30th of September 2010,

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2 but it may have been -- it may have been
3 earlier than that. My recollection is that
4 there was a subletting to Nomura.
5 MR. DE LEEUW: Thank you. Why don't
6 we take a break?
7 THE VIDEOGRAPHER: We are now off
8 the record at 2:13 p.m., September 12,
9 2013.
10 (Recess taken.)
11 THE VIDEOGRAPHER: This is tape four
12 of the deposition of Mr. Richard Millett.
13 We are now on the record at 2:18 p.m.,
14 September 12, 2013.
15 BY MR. DE LEEUW:
16 Q. Mr. Millett, could I ask you to take
17 a look at page 407, the treatise you co-wrote,
18 which has been marked as Exhibit 121?
19 A. Page 407?
20 Q. Yes, correct.
21 A. Okay.
22 Q. You see here in the first full
23 paragraph on page 407 of Exhibit 121, it's
24 stated in your treatise that, "A variation is
25 material, so as to entitle a surety to full

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2 discharge. However, only if it is an act by
3 the creditor which affects the risk of default
4 by the principal, and consequently the risk of
5 the surety being called upon to honor the
6 guarantee."
7 Do you see that?
8 A. Yes.
9 Q. In this case, the variation of the
10 forfeiture letter did not affect the risk of
11 default by LBL, did it?
12 A. I think it did, because the amount
13 of the provable back rent, whatever it was,
14 went from being payable 100 percent in priority
15 to all other creditors, to being a provable
16 debt at 18 cents on the dollar, or whatever it
17 is.
18 Q. Isn't that exactly what you were
19 referring to in the last sentence on page 407
20 of Exhibit 121, when you say that, "The type of
21 variation that affects the risk of default by
22 the principal must be contrasted with the
23 variation which merely affects the amount of
24 the surety's ultimate liability, but which
25 leaves the risk of default by the principal

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2 Exhibit 122.
3 (Exhibit 122, Portion of O'Donovan
4 and Phillips Treatise Entitled The Modern
5 Contract of Guarantee, marked for
6 identification.)
7 Q. It's a portion of the same O'Donovan
8 and Phillips treatise called The Modern
9 Contract of Guarantee.
10 A. Okay. This is the English edition,
11 2010.
12 Q. This is another portion of the
13 O'Donovan and Phillips treatise that was not
14 contained in the appendix that you provided
15 which we marked earlier as Exhibit 119.
16 Do you recognize Exhibit 122?
17 A. I mean, I recognize -- yes, I
18 recognize what it is. I mean, I haven't read
19 it recently.
20 Q. If I could ask you to turn to
21 paragraph 688 --
22 A. 688.
23 Q. -- of Exhibit 122.
24 Have you read paragraph 688 of the
25 O'Donovan and Phillips treatise before?

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2 A. I can't remember. Can I read it
3 now?
4 Q. Please.
5 A. (Perusing.) I have read that.
6 Q. Okay. The first sentence of
7 paragraph 688 of Exhibit 122 says, "The
8 creditor, instead of releasing the principal
9 debtor absolutely, may release the principal
10 debtor from only a portion of the debt, making
11 it clear that liability remains for the
12 balance."
13 Do you see that?
14 A. Yes.
15 Q. And that's, in fact, what happened
16 in the forfeiture letter, according to your
17 view. Canary Wharf released LBL for a portion
18 of the debt that was recoverable as an
19 administrative expense, while leaving the rest
20 of the claims for other rent available; is that
21 correct?
22 A. Well, shall we look at the
23 forfeiture letter?
24 Q. Sure.
25 A. I just don't want to embrace

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2 something you put to me as a paraphrase. You
3 understand why that is.
4 Q. I will hand to you what I'm marking
5 as Exhibit 123.
6 (Exhibit 123, Document Bates Stamped
7 LBHI_CW 234 through 243, marked for
8 identification.)
9 Q. It's a document bearing production
10 number LBHI_CW 234 through 243.
11 Do you recognize Exhibit 123?
12 A. (Perusing.) I do.
13 Q. This Exhibit 123 is what you
14 referred to as the forfeiture letter?
15 A. Yes.
16 Q. And the release that you referred to
17 in the forfeiture letter is set forth in
18 paragraph 4(b) -- I should say -- I will take
19 that back.
20 The release that you referred to in
21 the forfeiture letter is referred to in
22 paragraph four of Exhibit 123 on pages four to
23 five, right?
24 A. Well, I can read clause four. We
25 can look at the words.

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2 Q. I'm not asking you to repeat the
3 words. The releases that you are referring
4 to --
5 A. I see, yes.
6 Q. -- for reaching your opinion are set
7 forth in paragraph four of Exhibit 123,
8 correct?
9 A. Yes.
10 Q. And now to go back to my question.
11 The releases that you are relying on in this
12 case are a release for a portion of the debt,
13 while some liability remains for the balance;
14 isn't that correct?
15 A. I don't like your formulation, a
16 portion of the debt. To an English lawyer,
17 that has connotations which I'm not very keen
18 on.
19 What it says is that there's a --
20 LBL is unconditionally and irrevocably released
21 and discharged from any claims as an
22 administration expense for paid rent that fell
23 due and was payable under the lease before the
24 date of forfeiture.
25 Sorry. I'm just reading. LBL is

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unconditionally and irrevocably released.

Q. From the claims?

A. And discharged from any claims as an administration expense for unpaid rent that fell due and was payable under the lease before the date of forfeiture, and then the same in relation to estate service charges, and then other sums that fell due under the lease and Car Parking Agreement, which is a separate contract, before the date of forfeiture, and then the proviso is important.

Q. The proviso being the end of paragraph four of Exhibit 123 on page five?

A. Yes.

Q. Which says that, "LBL agrees that we and/or CWML may claim against LBL as an unsecured creditor for any unpaid rent and estate service charge and other sums falling due under the lease up to the date of forfeiture."

Do you see that?

A. Yes.

Q. So, to go back to my question earlier, assuming, as you have, that there are

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pay Nortel rent as an administration expense.

There is nothing else.

Q. Let me just give you a hypothetical set of facts, since you say you don't know what the facts were as of 2010.

If, hypothetically, LBL stopped occupying the building as of March 31, 2010, and there was a dispute about whether any rents were payable from April 1 through September 30, 2010, as an administrative expense, and there was also no dispute that, as of September 30, 2010, there was no dispute that any back rent would be payable as an administrative expense under Nortel, if that were the case, would you not agree with me that the effect of the releases in the forfeiture letter were to release LBL from a portion of the debt, while making clear that liability remains for the balance?

MR. ISAKOFF: I object to the form, and I have to have that question read back. I'm sorry. It was very, very long, and rambling, and I couldn't follow it.
(Record read.)

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some rents that would be payable as an unsecured claim, and some rents payable as an administrative expense, isn't it true that the releases in the forfeiture letter that you are relying on release LBL from only a portion of the debt, while liability remains for the balance?

A. No. This is why I quarrel with the formulation. I'm glad we looked at the provisions.

It's clear to me that what it does is to release LBL from liability to pay rent as an administration expense. Now, you say portion. If what you mean is there are some periods of the lease under which the rent was referable to periods when the administrators were in occupation, therefore, it's payable as an administrative expense, yes, that's what's being referred to.

There is no reference to any rent that fell due during the currency of the lease when the administrators were not in occupation. And so what is being released, what is being released and discharged is LBL's obligations to

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MR. ISAKOFF: I don't understand the question. If you understand it and can explain what the question is that you are answering, go ahead, so that we have a clear record. Otherwise, I don't think we do.

Q. Do you understand, Mr. Millett?

A. I think I understand.

Q. Well, why don't I give you the hypothetical facts first, and make sure you understand the hypothetical facts, and then I will ask you the question.

A. Yeah, okay.

Q. The hypothetical facts is that as of March 31, 2010, LBL ceased occupying the premises.

Are you with me so far?

A. Yes.

Q. There was a dispute --

MR. ISAKOFF: Were there still subtenants?

MR. DE LEEUW: I'm giving -- sir, you don't have a -- you don't have a place here to be speaking. Object or object to

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release for other quarters; is that fair?

MR. ISAKOFF: Object to form.

A. That's fair as far as it goes. Of course, the difficulty is you just don't know to what extent the release of one impacted on the commercial deal in respect of the other, but I don't agree with your formulation, which is why I was having trouble with it.

Q. But what you are agreeing with is that there's a debt due for each quarter, and what you are saying is there is a release of debt for particular quarters, but no releases for other quarters, and that would be a full release for certain debts and a partial release or no release for other quarters?

A. Yeah. I mean, you have a slight problem with the hypothesis. I suspect is that on the 3rd of December 2010, the final quarter hadn't yet finished.

Q. But you would agree with me that, for the final quarter, there was either no release or a partial release?

A. I can read the contract. I don't know what they did in relation to that. The

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for what period, and which of those were for administrative expense versus just an unsecured claim?

A. That is correct. That's what I said before, and I'm proceeding on a number of different assumptions or hypotheses as to what those were.

Q. You don't read what O'Donovan and Phillips say in their treatise, which has been marked as Exhibit 122, as saying that -- excuse me.

A. 122 is right.

Q. 122. You don't read that paragraph 688 as saying that if you release a portion of the entire debt outstanding on the principal contract, that does not operate as a full discharge of the surety?

MR. ISAKOFF: Object to form.

There's too many negatives.

Q. Do you read the O'Donovan and Phillips treatise, which has been marked as Exhibit 122, paragraph 688, as saying that if the release is only of a portion of the entire debt outstanding under the principal contract,

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contract is silent about that.

Q. Well, it says that that rent will be recoverable as an unsecured claim.

A. No. With great respect, it does not. And, again, you are putting words into the letter that aren't there, with great respect.

All it's simply saying is that any unpaid rent is the -- sorry -- it's the proviso.

Q. The proviso you are referring to is on page five.

A. The point I'm making here is that this letter does not distinguish between those periods for which unpaid rent that was due was due as an administrative expense, and that's why I don't like -- that's why I found the way you put the question very tricky to answer, because it's not what the letter does.

It doesn't draw that distinction. You might not have that distinguishing effect when you do the math, but it doesn't do that.

Q. What you don't know is what the facts are in terms of what rent was outstanding

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then there will not be a full discharge of the surety?

A. Well, I can see what it says. I don't disagree with -- I don't disagree, in the short time you have given me to look at it, necessarily with its conclusions, although I have to go and look at the cases which are referred to. They're Australian.

And, of course, as I said before, this is an English edition of what is actually an Australian publication. This bit of it seems to be highly Australian, if you look at it, if you look at footnote 209, but it seems to me that's a million miles away from this case, not only because there was no release of a portion of a debt anyway under the forfeiture letter, but, secondly, and perhaps more importantly for the purposes of answering your question, the release in the forfeiture letter wasn't a complete release.

The forfeiture letter did not say to LBL, oh, don't worry, you don't have to pay any rent at all during the time when the administrators were in occupation. The

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variation -- it wasn't a release of that liability. It was a release of the liability to pay it as an administrative expense, administration expense.

In other words, Canary Wharf weren't -- what Canary Wharf was doing was agreeing to line up as a creditor in respect of sums in respect of which otherwise they would have a priority for release.

Q. What you're saying there is that some portion of the outstanding amounts due under the lease were released, and some portion of them were not; isn't that fair?

A. It's not fair. Absolutely not.

Q. Why is that not true?

A. Because what was varied here was not the obligations as obligations. It was the manner of their performance.

On what Canary Wharf and LBL were agreeing to do between them, for their own reasons, is to let LBL off the hook for having to pay the rent as an administrative expense. In other words, in priority. It was a variation in the waterfall of priorities.

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It was a variation in the mode of performance of discharge of obligations in respect of a number of quarters of rent.

Q. My question wasn't about a release.

Was the forfeiture letter, in your view, a variation of the mode of performance with respect to some of the total debt outstanding from LBL?

A. No. I said this before. It's not. It was a variation of the mode of performance of discharge of the obligations in relation to debts -- sorry -- rents, if they were debts, for periods during which the administrators were in occupation. As I said, they arise quarter by quarter.

Q. And those quarters that you are referring to, where the administrators were in occupation, was a portion of the total time for which Canary Wharf could seek some repayment; is that not correct?

A. Mathematically, that's certainly right, but as a matter of law, it is incorrect.

Q. Could I ask you to turn to paragraph 6(g) of Schedule 4, which has been marked as

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Okay.

It's not a release in the same way that O'Donovan and Phillips are referring to in 688.

Q. You wouldn't agree with me that it was a release in the manner of performance for some portion of the amounts outstanding?

A. No, it wasn't even -- no, it wasn't.

It was a variation in the mode of performance of a debt which fell to be performed by paying it as a priority, and by means of a variation, ceased to be payable that way.

Q. What the forfeiture letter was, was a, according to you, a variation in the mode of performance of a portion of the total debt that was outstanding as of December 3, 2010; isn't that correct?

A. I don't think I said that it was a mode -- a release of the mode of performance of a portion of the total debt outstanding.

I go back to the answer I gave ten minutes ago, which was that, to the extent that it was a release at all, which it was not -- sorry. Let me start again.

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Exhibit 3?

MR. ISAKOFF: It's the guarantee.

A. Got it. Which paragraph?

Q. 6(g).

A. 6(g), yes.

Q. Your opinion is that paragraph 6(g) is not applicable here, because it is very widely drawn, and shouldn't be enforced as a catch-all; is that correct?

A. Well, again, I prefer to use the words I used in my opinion.

Can you just direct me to the passage in my opinion?

Q. Paragraph 62, sir.

MR. ISAKOFF: 62.

A. Paragraph 62, yes. It's a very widely long catch-all, which the English courts have been loathe to enforce.

Q. And so, therefore, your opinion is that it should not be enforced in this case?

MR. ISAKOFF: Object to form.

A. That isn't my opinion. My opinion is that 6(g) doesn't contain sufficiently clear and specific words which would oust the normal

1 MILLETT
2 We are now on the record at 3:26 p.m.,
3 September 12, 2013.
4 BY MR. DE LEEUW:
5 Q. Mr. Millett, you have read the
6 Reichman decision as well, have you not?
7 A. Yes, I have.
8 Q. The Reichman case did not raise the
9 question for the court's determination of
10 whether a landlord could recover compensation
11 for damages lost for future rent following
12 forfeiture, correct?
13 MR. ISAKOFF: Object to form.
14 A. It does.
15 Q. The issue --
16 A. I disagree.
17 Q. The issue in Reichman was whether
18 the landlord acted wholly unreasonably by
19 failing to forfeit the lease; is that not
20 correct?
21 A. That was the macro issue, but I have
22 to say I think, and it's part of the ratio of
23 the judgment, that the Court of Appeal does go
24 on to say that the law of England is that
25 damages for the loss of future rent can't be

1 MILLETT
2 argumentative.
3 A. I think the arguments go further
4 than that.
5 Q. That was the question that the court
6 needed to decide; is that not correct?
7 MR. ISAKOFF: Object to form, asked
8 and answered and argumentative.
9 A. I think we've covered this.
10 Q. The question before the court to
11 decide in Reichman was whether or not the
12 landlord's conduct was wholly unreasonable; is
13 that fair?
14 MR. ISAKOFF: The same objection,
15 asked and answered for now the third or
16 fourth time, argumentative.
17 He's answered it.
18 A. I mean, that was, I mean, certainly
19 one of the questions in the case, but in order
20 for the judge to be able to answer it, he had
21 to deal with, had to deal with the arguments
22 that he covers at paragraphs 22 through to 28.
23 It was part of the ratio of the decision.
24 Q. In paragraph 42, that's part of the
25 conclusion is Reichman, is it not?

1 MILLETT
2 recovered after the landlord has taken back
3 possession of the premises following a tenant's
4 default.
5 Q. Let me break that in two, if I can.
6 The question posed to the court was
7 whether it was wholly unreasonable, under the
8 White and Carter precedent, for the landlord
9 not to forfeit the lease and find a new tenant.
10 MR. ISAKOFF: Object to form.
11 Q. Correct?
12 MR. ISAKOFF: Object to form.
13 A. Could you say it again?
14 Q. The question posed for decision in
15 the Reichman case was whether the landlord
16 acted wholly unreasonably, under the White and
17 Carter precedent, in failing to take steps to
18 find an alternative tenant and forfeiting the
19 lease.
20 MR. ISAKOFF: Object to the form.
21 A. That was one of the issues in the
22 case.
23 Q. Well, that was the issue in the
24 case, was it not?
25 MR. ISAKOFF: Object to form,

1 MILLETT
2 A. Yes. I realize -- as well -- and
3 under the conclusions, yes, that's right, part
4 of the conclusions.
5 Q. And the conclusion is that the
6 landlord did not act wholly unreasonable in
7 failing to forfeit the lease, correct?
8 A. That's, as I say, the sort of macro
9 conclusion. That was the main issue in the
10 case, but in order to get there, the Court of
11 Appeal had to get there by a series of rational
12 steps based on legal principle.
13 And if you read paragraph 42, to my
14 mind, it's pretty plain that the Court of
15 Appeal is saying that there is no case in
16 English law that shows that a landlord can
17 recover damages from a former tenant in respect
18 of loss of future rent after termination, and
19 one case which decides that he cannot. In
20 those circumstances, either damages are not an
21 adequate remedy for the landlord, or at least
22 the landlord would be acting reasonably in
23 taking the view that he should not terminate
24 the lease because he may well not be able to
25 recover such damages.

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So, now, your characterization of the issue in the case is correct, but it ignores the steps required to get there. The learned lord justice says -- reaches his conclusion in paragraph 42 in those circumstances because of the learning and the conclusion of law that he has reached prior to that.

Q. Isn't the conclusion in Reichman that either the landlord could not recover damages for future rent, or at least the state of the law was uncertain enough so that the landlord did not act wholly unreasonably in not terminating the lease?

MR. ISAKOFF: Object to form.

A. That's a reformulation of the penultimate sentence in paragraph 42.

Q. In other words --

MR. ISAKOFF: Were you finished?

THE WITNESS: I was, yes.

Q. In other words, the judge didn't determine what would be the right determination of whether a landlord could recover damages as compensation for loss of future rent?

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MR. DE LEEUW: Stop. Stop.

MR. ISAKOFF: You stop.

A. It didn't duck the point. Can I just explain why? I do disagree with this.

Paragraphs 22 and following aren't there simply because Amanda Tipples turned up in court with a whole lot of interesting law. Lord Justice Patten is a man of relatively limited patience as a judge, and he would not have spent a lot of time and intellectual energy doing a close analysis and very learned analysis, in my view, if he didn't think it was absolutely central.

The Court of Appeal in England, I don't know about your Courts of Appeal here, are immensely pushed for time. They don't do anything unless they absolutely have to.

It's clear to me that this was not just an interesting academic aside. That is not what the Court of Appeal does.

If you look carefully at 22 and following, he actually decides the point, and he does so because he thinks it matters, and we can see that it matters in the conclusions.

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MR. ISAKOFF: Object to form.

A. No. I see why you say that. I think that is an overstretched approach to the rule of -- doctrine of precedence in England.

In my opinion, it is absolutely a central part of the ratio of this case that the -- that explains how the Court of Appeal got to where it got to. It was essential for it to be able to decide that the damages are not an adequate remedy, because -- and that was the issue before it.

It couldn't duck the point, but as a follow-up, the Court of Appeal said, or at least the landlord would be acting reasonably in taking the view that he shouldn't terminate the lease.

Q. So, it did duck the point, didn't it?

A. No, it didn't duck the point. Absolutely not.

Q. Didn't --

MR. ISAKOFF: Excuse me. You're interrupting him now. You've got to stop doing that.

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Q. Isn't it true that, in paragraph 28, what he says is, it can't be concluded what the law is, but the landlord did not act wholly unreasonably by acting the way it did in the light of the uncertainty under English law?

A. No. What you're focusing on is one of two separate questions. There are two questions, I think, which are in play. Stand back from the decision.

The first is whether, as a matter of general principle, it is possible for a lease to be terminated by the doctrine of accepted repudiation, right? That's the first issue, as to which, in paragraph 27, he says that there are arguments each way on the point.

I have my own views about them, if you are interested in them, and I have looked at the Blundell lectures, but he does say, and I'm quoting from five lines down in paragraph 27, "It may be a logical development to hold that a landlord, having forfeited the lease, can recover damages for the loss of future rent, at least if the breach which led to the forfeiture was fundamental and repudiatory, but

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it does not seem to me that English law has yet reached that stage."

Now, to my mind, that's a conclusion. English law has not matured sufficiently to allow the court to reach that result.

Now, in order for the court in New York to reach that result, it would be developing English law beyond the parameters, which even the Court of Appeal, as recently as seven years ago refused to do. So English law has not gone that far.

Now, that is not an aside. It was essential.

Paragraph 28, he then goes on to say, and this is the second aspect of it, "If it is still the law of England that damages for the loss of future rent cannot be recovered after the landlord has taken back possession of the premises following a tenant's default, as seems to me to be the case, then damages cannot be an adequate remedy for the landlord in the circumstances suggested by Mr. Gauntlett."

And that's about the second aspect,

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Court of Appeal is saying is the law in England does not allow a landlord to recover damages for the loss of future rent once he's taken back possession.

In order for the law to say that he can, it's got to go to the House of Lords, which is now the Supreme Court, and who knows what would happen there. That's all very interesting, but the -- but the landlord couldn't be criticized for not wanting to go all the way to the House of Lords to have the point determined.

That's all he's saying. He's not saying the law is in doubt, I don't know what it is at all.

Q. So, you don't read the statement by the judge in Reichman that there is uncertainty of the position at law to be a statement that he doesn't reach a conclusion as to what the right position is as a matter of English law?

MR. ISAKOFF: Object to form.

A. Well, no, I don't. It's -- he is saying -- it's an even if. Even if it's not clear that this is the position under English

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not about repudiation, but about whether you can ever get damages representing the loss of future rent following re-entry or forfeiture. And he says, and to me in absolutely crystal clear terms, no.

Q. And you think that the last two sentences do not express any doubt about what the conclusion might be. "Even if it is not clear that this is the position under English law, the uncertainty of the position at law would be relevant to the reasonableness or otherwise of a landlord's conduct. The landlord could not be criticized for wishing to avoid embarking on litigation which might have to go to the House of Lords before the point was settled."

Do you not read that as the court stating that the point of law has not been determined and won't be determined in this case?

A. Well, you're right to some extent. It's certainly there, but the way I read that, as -- and I don't think there's any real dispute about it, is, simplifying it, what the

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law, so you should never construe cases like they are statutes.

But it's obvious to me that he's saying two things in 28. A, it seems to me not to be the law in England that a landlord can get damages for loss of future rent once he has re-entered.

And, two, even if I'm wrong that it's not clear, I think it is, but if I'm wrong about it, then it would have to go to the House of Lords anyway, and the landlord can't be criticized for not taking that course.

That's how I read it.

Q. In other words, based on your reading, the court in Reichman didn't need to reach the conclusion as to whether or not damages for future rent were recoverable, and did not do so?

MR. ISAKOFF: Object to form.

A. No, I don't say that at all, because if the argument had been the other way -- actually, it's clear that the landlord can recover damages, then it wouldn't have been necessary to get into the second point.

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No, it's a very normal way of writing a judgment. I'm right on A, but if I'm wrong on A, then B. It doesn't mean that it wasn't necessary to arrive at the conclusion in A.

Q. Isn't it the case, sir, that, in fact, the conclusion in Reichman was, given the unsettled state of the law, I don't need to determine whether a landlord can recover for future rent, because I determined that the landlord in this case did not act wholly unreasonably?

MR. ISAKOFF: Object to form.

A. That would be a very fair question if the decision in Reichman had been rather different, and I can well see lots of judges doing exactly that, saying it's all very difficult, I don't know what the answer is, I don't want to stick my neck out. You know what, it's so difficult, it's not unreasonable for the landlord to do what he does.

But that isn't, looking at the decision, what happened in the case. The Court of Appeal, as I said before, there need to be

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A. It was necessary for the decision. I'm not saying that the court -- a court -- I wasn't sitting on the panel. I haven't seen the arguments, but -- and I haven't read the judgment in the first instance, and I'm not saying that if I knew more, and certainly Mr. Rabinowitz hasn't been able to point to anything to draw it to my attention, I'm not saying it isn't impossible for a lazy court to come to a different conclusion.

But this is a well-reasoned decision, and I have -- I have no real doubt at all that any English judge, faced with this decision, would regard it as authoritative, not obiter dictum, O-B-I-T-E-R D-I-C-T-U-M.

Q. Could I ask you to turn to Schedule 4 that's been marked as Exhibit 3?

A. Can I just add one more thing?

Q. Please.

A. Sorry. And that is that even if you're right, and I don't accept for a moment that you are, that Reichman is -- the decision in Reichman is all obiter, and everything that we've seen in that judgment is all just so much

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good reasons for doing this, actually went and decided the point.

What was unnecessary, in my opinion, was the secondary bit, because it was perfectly open to Lord Justice Patten to say, given the views I have taken about the present position or the position under English law, the question of reasonableness of the landlord's conduct doesn't arise.

Q. So, you would agree with me, would you not, that the question of whether the landlord could recover future rent as damages in the case of re-entry was not necessary for the decision in Reichman?

MR. ISAKOFF: Object to form.

A. It was central to the decision in Reichman.

Q. But was it necessary for the decision in Reichman?

MR. ISAKOFF: Objection.

A. Yes.

MR. ISAKOFF: Asked and answered. You don't have to ask the same question over and over again.

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paper, the English Court of Appeal, and certainly the English high court, would be bound by the decision in Walls and Atcheson, which is referred to at paragraph 23, which was the Court of Common Pleas, which was a court of sufficient seniority certainly to bind the court of the first instance after 1873.

Q. You would agree with me that the decision in Walls and Atcheson did not deal with a tenant's repudiatory breach, correct?

A. Well, that's -- that is right, and that's because the doctrine of repudiatory breach is of far more recent origin, and much more immature in its development.

The principle that a landlord can't recover damages by way of nonpayment of rent, regardless of repudiation or otherwise, once he has taken back the premises, is of very ancient origin.

Q. You would agree with me that the law now in England is that there can be a repudiatory breach in England of a lease, correct?

A. I don't -- no, I don't think it's

1 MILLETT
2 settled. I think there are arguments on that
3 both ways, and the Blundell lectures set those
4 out in interesting detail.
5 My own view, for what it's worth, is
6 that -- is that there are extremely compelling
7 reasons why a lease can't be terminated by a
8 doctrine of accepted repudiatory breach.
9 Q. You would agree, generally, that
10 over the years, courts in England have treated
11 leases more like other contracts?
12 MR. ISAKOFF: Object to form.
13 Q. Correct?
14 MR. ISAKOFF: Object.
15 A. Courts over the years have treated
16 leases more like other contracts?
17 Q. Yeah, I see you have a problem.
18 You would agree that there has been
19 a -- would you agree with me that there has
20 been a trend in English law to treat leases
21 more like other contracts?
22 MR. ISAKOFF: Object to form.
23 A. I don't agree with that. If you can
24 point me to anything that identifies that
25 trend, I'd be happy to look at it, but, no, it

1 MILLETT
2 hasn't been my experience.
3 Q. Well, there used to be a doctrine
4 that frustration of leases was now possible,
5 correct?
6 A. Yes, that's right.
7 Q. And now it's the case that -- and
8 now it's the case that frustration of leases is
9 available, correct?
10 A. Well, it's just -- that's a bit
11 black and white, a bit simplistic.
12 Would you like me to answer the
13 question?
14 Q. Is it the case that frustration of
15 leases has been accepted as a doctrine?
16 A. It is possible, since 1977,
17 following the Panel Peanut case, that it is
18 possible for a lease to be discharged by
19 frustration, but that is the, to my knowledge,
20 the limit of the incursion of contractual
21 principles into the law of landlord and tenant.
22 I would also add that, and I looked
23 at Panel Peanut, that there is the world of
24 difference between discharge by frustration and
25 discharge for accepted repudiation. I mean, I

1 MILLETT
2 could list them, but they are category
3 different, and I don't accept at all, and one
4 can spend a lot of time on this, that you can
5 extrapolate or rationalize, from the fact that
6 the House of Lords, in 1977, decided that a
7 lease was capable of discharge by frustration,
8 that it was also capable of discharge by the
9 application of the doctrine of repudiatory
10 breach.
11 Q. Can I ask you to turn to Exhibit 3,
12 Schedule 4, paragraph seven, please?
13 A. Yes, paragraph seven.
14 Q. Would you agree with me that there's
15 nothing in paragraph seven that explicitly says
16 that it is the exclusive remedy to the landlord
17 in the case of forfeiture?
18 MR. ISAKOFF: Object to form.
19 You want to hear it back?
20 THE WITNESS: No. I understand the
21 question.
22 A. There is nothing in there which says
23 that it's -- there's nothing in there, by way
24 of express words, that says that it's the
25 exclusive remedy of the landlord, and there may

1 MILLETT
2 be others.
3 I mean, for example, if the lease
4 was forfeited, but the tenant then refused to
5 give up possession, the landlord would have a
6 right to go to the court and demand an order of
7 possession. So it's not an exclusive remedy.
8 Q. Is there anything from paragraph
9 seven or elsewhere that says that paragraph
10 seven of Schedule 4 is the exclusive remedy of
11 the landlord as against the surety in the case
12 of forfeiture?
13 MR. ISAKOFF: Object to form.
14 A. I think I have answered that.
15 There's nothing in there that says that it's
16 the exclusive remedy in terms.
17 Q. Your conclusion that Canary Wharf's
18 exclusive remedy in this case is under
19 paragraph seven is based on your interpretation
20 of paragraph one; is that correct?
21 MR. ISAKOFF: Object to form.
22 A. I'm sorry. Can you say that again,
23 please?
24 Q. You conclude in this case, do you
25 not, that Canary Wharf's exclusive remedy is